No. 83-541

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

REPUBLIC INDUSTRIES INC.,
*Petitioner,*

v.

TEAMSTERS JOINT COUNCIL
NO. 84 OF VIRGINIA PENSION FUND,
*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit**

## REPLY OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION

*Of Counsel*
LESTER M. BRIDGEMAN
LOUIS T. URBANCZYK
304 Capital Gallery East
600 Maryland Avenue, SW
Washington, D.C. 20024
(202) 484-5911

PHILIP B. KURLAND*
CHRISTOPHER G. WALSH, JR.
Two First National Plaza
Chicago, IL 60603
(312) 372-2345
**Counsel of Record*

November 7, 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## Table of Authorities Continued

Petitioner, Republic Industries, Inc. ("Republic") submits this brief in reply to the brief in opposition filed by Respondent, Teamsters Joint Council No. 83 of Virginia Pension Fund (the "Fund"), and to the *amicus* brief filed by the Pension Benefit Guaranty Corporation ("PBGC"). Petitioner prays that the Court promptly grant this petition and consolidate this case for argument with *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, No. 83-245, and *Oregon-Washington Carpenters-Employers Pension Trust Fund* v. *R.A. Gray & Co.*, No. 83-291, *probable jurisdiction noted*, 52 U.S.L.W. 3308 (U.S. Oct. 17, 1983).

The record made in this case, unlike the spare record in *PBGC* v. *R.A. Gray & Co.*, *supra*, and *Oregon-Washington Carpenters-Employers Pension Trust Fund* v. *R.A. Gray & Co.*, *supra*, shows how the so-called "ameliorative" provisions of the Act and the statutory "exemptions" actually have been applied by the funds, *see* App. at 166a-184a, 201a-207a, how unfunded liabilities come into being and how actuaries go about hypothesizing the amount of "unfunded vested benefit liability" allocated as withdrawal liability, *see* App. at 185a-200a, and what consequences retroactive application of the statute will have, *see* App. at 150a-163a. The Court should not deprive itself of the benefit of this record by holding this petition for disposition in light of *Gray*.

## STATEMENT

Respondent asserts that "a pension fund's withdrawal liability determinations are not immunized from *de novo* review" and observes that "full judicial review of any legal issues" may be had. Brief of Respondent at 2. It is true that *some* form of "judicial review" of "legal issues" may be had. *Id.* It is not at all clear, however, what is an issue of "fact," as opposed to one of "law," in a MPPAA arbitration instituted to resolve disputes over the self-interested "determination[s]" of fact and law made by the Fund. 29 U.S.C. § 1401(a)(1). And, it is simply *wrong* to say that *de novo* review of the Fund's self-interested "determination[s]" is available. Under MPPAA, neither the

private arbitrator, nor any Article III court, may review *de novo* the self-interested "determination[s]" made by the Fund. 29 U.S.C. §§ 1401(a)(3)(A), (B), (b)(3), (c). It is the want of *de novo* review, not the want of *some* form of arbitral or judicial review, that raises grave constitutional issues under both Article III and the Due Process Clause of the Fifth Amendment.

Respondent also asserts that there is "no record" showing "the true extent of [Republic's] aggregate liability." Brief of Respondent at 2. This is simply *wrong*. This case comes before this Court because the Court of Appeals affirmed the District Court's grant of the Fund's cross-motion for *summary judgment*. The aggregate amount of the withdrawal liability claimed is both alleged in paragraphs 17 through 21 of the complaint and is otherwise of record by way of the affidavit appearing at pages 158a through 163a of the Appendix filed with this Petition. The well-pleaded factual assertions of the complaint and of the affidavit pertaining to the aggregate liability claimed, which have not been challenged by the Fund in accordance with Rules 12(b) and 56 of the Federal Rules of Civil Procedure, must be taken as true in the present procedural posture of the case. They are true. And, though Republic has the right to contest the statutory validity of these claims, it should be self-evident that the claims would not have been asserted unless the funds had a good faith belief in their validity, notwithstanding the so-called "ameliorative" provisions of MPPAA and any statutory "defenses" available. In any event, *the statute says* the claims are potentially conclusive, 29 U.S.C. § 1401(b)(1), presumptively valid, *id.* §§ 1401(a)(3)(A), (B), and immediately payable, notwithstanding any "defenses" asserted by, or "ameliorative" provisions invoked by, the employer, *id.* §§ 1399(c)(2), 1401(d).

Respondent also says that "because this suit does not encompass an 'as applied' constitutional challenge to the MPPAA, the magnitude of Republic's total withdrawal liability simply is irrelevant to the issues presented herein." Brief of Respondent at 3. This is not necessarily so. The statute already has been applied to Republic by all of the funds which have asserted

claims. If they do not believe their claims are valid, they should not have asserted them. Republic already is *paying* the amount claimed by the Fund on the schedule unilaterally established *ex parte* by that self-interested private entity because the statute *requires* Republic to do so, 29 U.S.C. §§ 1399(c)(2), 1401(d), and because the lower courts denied Republic's plea for preliminary and permanent injunctive relief. Moreover, whether or not "as applied" claims are ripe and properly before this Court prior to arbitration, the magnitude of the withdrawal liability claims asserted against Republic relative to its net worth is material to the "facial" constitutionality of retroactive application of MPPAA. If there are statutory defenses "ameliorating" Republic's aggregate liability, these claims should not have been asserted. That the statute provides no "reasonable ceiling" on employer liability, *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 386 (1980), and permits a crushing liability that substantially exceeds petitioner's entire net worth to be asserted, notwithstanding the so-called "ameliorative" provisions of the statute, illustrates and brings into sharp relief the constitutional vices of MPPAA, particularly insofar as it applies retroactively to petitioners such as Republic who had no actual knowledge of, and no opportunity to alter their course of conduct in light of, the crushing liability retroactively imposed and immediately payable.

Respondent also contends that MPPAA did not create a "totally new form of liability." Brief for Respondent at 3. This is simply *wrong*. Prior to MPPAA, Republic was subject to a contingent *termination* liability—prospectively applied and scrupulously limited by Congress to 30% of net worth. 29 U.S.C. §§ 1362(b)(2), 1364 (1976). It was not subject to any "withdrawal liability." The contingent termination liability to which Republic was subject at the time of the conduct which has triggered its massive, retroactively imposed liability under MPPAA, was dependent on acts *other than* the cessation of contributions to the funds. The contingent liability imposed by 29 U.S.C. § 1364 (1976) was shared with all employers which had contributed to the terminated plan within the 5

years preceding plan termination, including those contributing to a fund at the time of plan termination. And, the liability was a *reimbursement* liability payable to *PBGC*, not a liability payable to the claimant funds under MPPAA.

Indeed, under pre-MPPAA provisions of ERISA, the act later defined as a "withdrawal" by MPPAA—the cessation of contributions—was a liability-mitigating act because employers which had ceased their contributions prior to the 5 plan years preceding the plan termination that triggered the contingent reimbursement liability payable to PBGC had no liability under ERISA. Under MPPAA, what previously was a liability-*mitigating* act retroactively became a liability-*creating* act.

Finally, respondent seems to submit that Republic somehow has "profited from the Fund's good faith efforts to comply with the statute." Brief of Respondent at 4. The Fund has a peculiar concept of "profit." *See* Affidavit of R.B. Riss ¶¶ 43-45, App. at 160a-161a. In any event, the Fund misses the point. Having *admitted* that it twice made errors, first in determining whether a "withdrawal" had even occurred, and second in calculating the amount of the withdrawal liability owed, the Fund goes on to say that the procedural due process issues raised are insubstantial *even though:* (1) Republic cannot obtain *de novo* review of any "determination[s]" made by self-interested claimants either in private arbitration or on judicial review, 29 U.S.C. §§ 1401(a)(3)(A), (B); (2) the risk of error is a significant, if not the primary, factor to be weighed in determining the constitutionality of MPPAA's prepayment mandate; and (3) the potential for arbitrary and capricious enforcement is a critical factor to be weighed in assessing the merits of petitioner's "vagueness" challenge to, *inter alia*, the provisions of 29 U.S.C. § 1383(d) that the Fund now says it "mistakenly" applied, Brief of Respondent at 4, because of its declared "uncertainty" as to the meaning of the term "employer"—which is not even defined—and the "conflicting interpretations" that it had received in "informal discussions with PBGC's staff," in the absence of "any regulations . . .

which offer guidance on this issue." App. at 180a-181a. *Compare id., with* Brief of Respondent at 14 ("MPPAA provisions cited as facially vague, read in context and in conjunction with the legislative history of these provisions and applicable regulations, provide sufficient guidance").

When Republic was confronted with retroactively created, presumptively valid and immediately payable claims far exceeding its entire net worth that had been asserted by self-interested private claimants whose "determination[s]" of fact and law are immune from *de novo* review under the private arbitration scheme mandated by the statute, Republic had no real choice other than to invoke its constitutional right of access to an Article III court. But, whether "as applied" claims are properly before this Court or not, Republic respectfully submits that the record made in this case will assist this Court in addressing the "facial" constitutionality both of retroactive application of MPPAA and of the procedures mandated for the assessment, adjudication and collection of "withdrawal liability" claims.

## I

## THE CONSTITUTIONALITY OF RETROACTIVE APPLICATION OF MPPAA PRESENTS A SUBSTANTIAL QUESTION

Respondent's assertion that the Fourth Circuit's ruling on the constitutionality of retroactive application of MPPAA presents no substantial federal question warrants no lengthy reply. The Ninth Circuit's contrary ruling refutes it. *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502 (1983). It does bear emphasis, however, that respondent's assertion is predicated on the notion that the Fourth Circuit applied the proper standard of review. It did not.

Petitioner, unlike the appellee in *Gray*, submits that the standard of review applied in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) and *Nachman* v. *PBGC*, 592 F.2d 947 (7th Cir. 1979), (*cert. denied on constitutional issues*, 442 U.S. 940 (1979), *aff'd on Statutory grounds*, 446 U.S. 359

(1980), should not govern the constitutionality of statutes—like MPPAA but unlike the statutes at issue in *Usery* and *Nachman*—which are not only "retroactive in impact," Brief of Respondent at 8, but which also *apply retroactively, i.e.*, create *new* liability-creating incidents triggering the imposition of *new* and oppressive liabilities for pre-enactment conduct that cannot be altered after the fact. Such a statute, unlike the statutes at issue in *Nachman* and *Usery*, infringes what petitioner submits is a "fundamental" right to "fair warning," *Marks* v. *United States*, 430 U.S. 188, 191-92 (1977), the principle which animates both the Ex Post Facto Clause and the Due Process Clause of the Fifth Amendment. Such a statute, unlike the statutes at issue in *Usery* and *Nachman*, deprives the citizen of a significant "liberty" interest—the opportunity to choose one's course of conduct in light of the law in effect at the time one acts.

If we are to remain "a government of laws and not of men," *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 157, 163 (1803), the citizen must be at least presumptively "entitled to be informed as to what the state commands or forbids," for that is one of the presuppositions of "[l]iving under a rule of law." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162 (1972). What statute could be more vague in "all of its [retroactive] applications," *Village of Hoffman Estates* v. *Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982), than a statute which has not yet gone through the constitutionally mandated processes for becoming part of the law of the land at the time of the conduct which Congress seeks to subject to regulation after the fact?

Petitioner recognizes that any constitutional principle, carried to its extreme, almost always "proves too much," and that the concept of "fair warning" may not be of controlling significance in and of itself in assessing the constitutionality of statutes which alter merely the procedural or remedial consequences of conduct *malum in se*, *Dobbert* v. *Florida*, 432 U.S. 282, 297-98 (1977), or conduct *malum prohibitum* subject to prior regulation "in the particular" to which the con-

stitutional claimant objects, *Veix* v. *Sixth Ward Bldg. Ass'n*, 310 U.S. 32, 38 (1940), or statutes which retroactively regulate conduct that would not have been altered even if "fair warning" had been given, *Welch* v. *Henry*, 305 U.S. 134, 146-47 (1938). But notice and fair warning is of the essence of due process of law and of the essence of the rule of law itself. And, petitioner respectfully submits that, unless the Court confronts petitioner's "fundamental" right to "fair warning" argument in the course of assessing the constitutionality of retroactive application of MPPAA—an argument that is unlikely to be advanced by any of the parties in *Gray*—the Court may never get to the heart of the issue. An *amicus* brief is not an effective substitute for party status.

## II

## THE OTHER CONSTITUTIONAL ISSUES ALSO ARE SUBSTANTIAL

The plain language of the statute refutes the contention that the presumptions of correctness "do little more than allocate the burden of proof of the employer." Brief of Respondent at 13. It is not the "preponderance of the evidence" language that is troubling, but rather the language defining *what* an employer must prove by a preponderance: (1) the "*un*reasonable or clearly erroneous" character of the Fund's self-interested "determination[s]," and the "in the aggregate, *un*reasonable" character of the "actuarial assumptions" on which its funded vested benefit liability "determination" rests. 29 U.S.C. §§ 1401(a)(3)(A), (B).

To appreciate the outcome-determinative character of these presumptions, the Court must understand that "actuarial assumptions" are no more than "guesstimates" of the unknown past and the unknowable future, and that it "is the rule, rather than the exception, that actuarial assumptions will turn out to be wrong." Affidavit of Joseph LoCicero, §§ 16.21-.27, App. at 193a-200a. Even seemingly minor alterations in actuarial assumptions can alter the size of the unfunded vested benefit liability allocated as withdrawal liability by *billions* of dollars.

as happened in one of Republic's pending cases. *Id.* § 16.27, App. at 199a-200a.

By converting private arbitration into a proceeding to *review* the "*un*reasonableness" of the Fund's self-interested determinations of fact and law, the statutory presumptions not only saddle Republic with an impossible burden of proof but also deprive Republic of its right to an impartial adjudicator, *i.e.*, one empowered to determine *de novo* the facts upon which the existence and amount of the liability depends, and to apply the law to the facts as found.

If Congress has power to *compel* the adjudication of a money claim advanced by one private litigant against another private litigant via *private* arbitration simply because the claim is statutory, what is left of *Curtis* v. *Loether*, 415 U.S. 189 (1974), or the Seventh Amendment? The rights created by MPPAA are *not* "public rights," *i.e.*, rights which "at a minimum arise 'between the government and others." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 2870 (1982). Compare, App. at 24a-25a, with 29 U.S.C. §§ 1302(b), (f).

Even if Congress has power to delegate the adjudication of federal statutory rights to *private* arbitrators, as opposed to Article I courts or administrative agencies that at least are accountable to the political branches, the Due Process Clause, if not Article III itself, must require at least that Congress prescribe *some* qualifications for the judicial "office" it has created, and that the private citizen's "judgment" be subject to the *de novo* review of an Article III court.

Respondent's own correspondence refutes its contention that the statutory provisions challenged as vague provide sufficient guidance. App. at 180a-181a. If Congress has power to delegate to self-interested claimants the power to make "determination[s]" of fact and law concerning the existence and amount of their adversaries' financial liabilities, determinations which are immunized from later *de novo* review, 29 U.S.C. §§ 1401(3)(A), (B), the Due Process Clause surely must require at least that Congress define what it

means by such terms as "employer," "substantially all," and "primarily engaged in," 29 U.S.C. § 1383(d), as well as "facility," 29 U.S.C. § 1397(a)(2). *See* at 166a-184a.

Finally, both respondent and the Fourth Circuit are wrong in suggesting that there is any "doubt" as to whether the "taking without just compensation" issue was raised in the District Court. It was squarely asserted in paragraph 25 of the complaint. In any event, because the Fourth Circuit addressed the issue, it is properly before this Court. *E.g.*, *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 378 M-1 (1970); *Jones* v. *United States*, 362 U.S. 257, 272 (1960). What reciprocal benefit will Republic, its shareholders, directors, officers and the employees who depend upon Republic for their livelihood derive from the confiscation of Republic's entire net assets? *See Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 134-35 (1978). Or is the forfeiture of one's entire net worth for pre-enactment conduct that cannot be altered after the fact just one of the unfortunate but inevitable costs of living in a "civilized" society?

## CONCLUSION

The Court should promptly grant this petition and consolidate the case for argument with *Gray*, Nos. 83-245 and 83-291.

Respectfully submitted,

*Of Counsel*
LESTER M. BRIDGEMAN
LOUIS T. URBANCZYK
304 Capital Gallery East
600 Maryland Avenue, SW
Washington, D.C. 20024
(202) 484-5911

PHILIP B. KURLAND*
CHRISTOPHER G. WALSH, JR.
Two First National Plaza
Chicago, IL 60603
(312) 372-2345
**Counsel of Record for Petitioner*

November 7, 1983